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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 9

HENRY ALBRECHT, SENIOR; HENRY ALBRECHT, Junior, and Thomas Maher, Plaintiffs in Error

v.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The case has been brought here directly from the District Court, which rendered no opinion.

JURISDICTION

The judgment of the District Court was entered March 31, 1924. (R. 12, 14, 19.) The petition for writ of error was filed May 2, 1924. (R. 19.)

It was asserted in the trial court—

(1) that by reason of defects in the information and of defects in the warrant, under which the

defendants were arrested and brought before the court, the District Court had no jurisdiction over the defendants (R. 9–12; 15–18), and

(2) that owing to defects in the information and warrant of arrest the accused were deprived of rights guaranteed by the Fourth Amendment to the Constitution of the United States (R. 16, Par. VI, motion in arrest).

These points are reiterated in the assignments of error. (R. 20–22.)

The writ was sued out under Section 238 of the Judicial Code, as it stood prior to the effective date of the Act of February 13, 1925.

THE QUESTIONS

The questions presented are whether the District Court was without jurisdiction to try the defendants on an information because the information was unverified, and because the warrant of arrest under which the accused were brought into court was void since it was not based on a showing of probable cause supported by oath, as required by the Fourth Amendment, although after the arrest and before trial the accused gave bond to appear. There are other points involving (*a*) sufficiency of the allegations of the information, (*b*) whether there was evidence to warrant submission of the case to the jury as to the two Albrechts, and (*c*) whether the sentence imposed double punishment. Of the 27

assignments of error only 10 are relied on (Br. 25–27), and these 10 are combined under 4 general heads, as follows (Br. 28):

> *First.* That the information and warrant based thereon were insufficient to give the court jurisdiction of the plaintiffs in error, because the verification purporting to support the same was insufficient. (Covering specified errors I to V.)
>
> *Second.* That neither count of the information charges an offense under the laws of the United States. (Covering specified errors VI to VII.)
>
> *Third.* That, as to the plaintiffs in error, Henry Albrecht, Sr., and Henry Albrecht, Jr., the evidence wholly fails to establish their guilt of the crimes for which they stand convicted. (Covering specified error VIII.)
>
> *Fourth.* The judgment and sentence with respect to certain counts is unlawful as imposing double punishment. (Covering specified error IX.)

STATEMENT

On March 26, 1924, the United States Attorney filed in the District Court of the United States for the Eastern District of Illinois an information in nine counts, charging the plaintiffs in error in four counts with having sold liquor, in four other counts with having possessed liquor, and in one count with having maintained a common nuisance, in violation of the National Prohibition Act. (R. 1–5.) The

information was not verified. To it were attached two affidavits, each signed and sworn to before a notary public, by two of the agents who were mentioned in the information as having purchased the liquor, or as having seen it in the possession of the defendants. (R. 6–7.)

On the same day the court ordered a bench warrant to issue for the arrest of the defendants. (R. 8.) The warrant was issued (R. 18) under date of March 26th, and under the date of March 27th (R. 19) the marshal signed a return that he had executed the writ and had the defendants in court (R. 19).

After their arrest, and on March 26th or March 27th, the plaintiffs in error here gave bond to appear and answer the information and were released from custody, and were not thereafter in custody by virtue of the warrant or otherwise, and their subsequent appearances in court were in response to their bond. The fact of their giving bail is not disclosed by the original printed record, which is incomplete, but before this case is argued it is expected the record will be supplemented to show the facts.

On March 28, 1924, the plaintiffs in error appeared specially and filed a motion to "quash the information and each count thereof" on the ground that it did not state an offense and because it was not supported by sufficient affidavits to show probable cause and because the information and affida-

vits attached to it were not sufficient to authorize the issuance of a warrant of arrest. (R. 8–9.) This motion was directed only to the information, and at the time it was filed plaintiffs in error were not in custody and had been released on bond and were not held under the warrant. This motion seems to have been brought on for hearing on March 31, 1924, when the case was called for trial.

The United States Attorney, to meet the suggestion that the information required verification and that somehow at that stage of the proceedings the validity of the warrant could be questioned, met the point that the affidavits originally attached to the information were sworn to before a notary public by asking leave to have the affidavits resworn before the Clerk of the court and refiled. (R. 24–26.) This leave was granted, together with permission to file some supplemental affidavits to meet the contention made that probable cause was not sufficiently shown by the original affidavits. After the original affidavits were resworn and refiled and supplemental affidavits fortifying probable cause were filed, counsel for the accused asked leave to refile their motion to quash so as to reach the information and corrected and additional affidavits. Leave was granted (R. 24–25), and a new motion to "quash the information and each count thereof, and the warrant issued on the same" was filed (R. 9–10), the grounds being that the information did

not state an offense and was not a sufficient basis for the issuance of any warrant because not properly verified, and that the original affidavits upon which the warrant had been issued were made before a notary public, not authorized to administer oaths in such proceedings. By this motion the accused moved not only to quash the information but to quash the warrant. The motion was denied, and thereupon a demurrer to the information was interposed on the same grounds, and that was overruled (R. 11–13), and the case proceeded to trial.

While the record speaks of amendments to the information, as a matter of fact the information was never amended. The affidavits filed with it were amended by being resworn before a proper official, and some supplemental affidavits were filed, but the information, as a criminal pleading, was not changed.

SUMMARY OF ARGUMENT

The validity of the information as a criminal pleading forming a basis for trial and the validity of the warrant of arrest are distinct matters. An information as a basis for prosecution and trial in the Federal courts does not require a verification or supporting affidavits, and the jurisdiction of the court to try the defendants under an information is not affected by the fact that it is not verified. A warrant of arrest based on the information is void unless the information is verified or supported by a properly sworn affidavit, as required by the Fourth

Amendment, but the invalidity of the warrant does not affect the validity of the information as such. The issuance of a valid warrant of arrest is not a condition precedent to the court having jurisdiction to try the accused on the information.

In the present case the information was valid, but the warrant was void because the affidavits were not sworn to before an officer authorized to administer oaths in criminal proceedings in the Federal courts. Although the accused were brought into court by virtue of a void warrant, there was thereafter no unlawful detention. Upon their arrest, the accused having given bail, the warrant of arrest had performed its office and they were thereafter held by virtue of their bonds and not by force of the warrant. In any event, before their trial proceeded, proper affidavits were filed showing probable cause supported by oath justifying the detention of the accused if they had not appeared in response to their bonds. The fact that a defendant is brought into the jurisdiction or custody of a court illegally does not deprive the court of jurisdiction to try him, at least where he is not detained illegally after coming within the jurisdiction or after being taken into court.

Finally, all attacks made by the accused on the warrant or the arrest were coupled with attacks on the validity of the information. The information was valid and the motion to quash it was properly denied. Where a motion is too broad and asks for

some relief to which the moving party is not entitled it is not error to deny the whole.

The allegations of the information sufficiently charged an offense against the United States. There was evidence sufficient to support the verdict against the two Albrechts, and double punishment was not imposed.

ARGUMENT

I

THE INFORMATION WAS VALID, THOUGH NOT VERIFIED, AND THE INVALIDITY OF THE WARRANT OF ARREST DID NOT DEPRIVE THE COURT OF JURISDICTION TO TRY THE DEFENDANTS

The plaintiffs in error have confused the matter of the sufficiency of the information as a criminal pleading and as a basis for trial with the question of the validity of the warrant of arrest on which the accused were first brought into the presence of the court.

An information in the Federal courts as a basis for prosecution and trial does not require a verification or supporting affidavits.

In England, before the Revolution, informations were of two kinds—those filed by the Attorney General or Solicitor General and those filed by Masters of the Crown. At common law the former did not require verification or supporting oaths. The oath of office of the official filing it was considered sufficient to afford verity to its allegations.

The provision of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on indictment left informations available in the Federal Courts for prosecution of minor offenses. It is settled by the decisions that in this country informations filed by prosecuting attorneys are like those filed in England by the Attorney General and Solicitor General, and require no verification as a basis for trial and punishment unless there be some statutory provision requiring verification.

Section 1022 of the Revised Statutes, which provides that—

> All crimes and offenses * * * which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney,

imposes no requirement that the information must be verified. It is clear that an information in the Federal courts to be valid as such—that is, a basis for prosecution, trial and sentence—need not be verified.

The validity of a warrant of arrest issued to bring the accused to the bar for trial on the information is another matter, because of the requirements of the Fourth Amendment, that no warrant shall issue but upon probable cause supported by oath or affirmation. If a warrant of arrest is based on an information, the warrant is invalid unless the information is verified or supported by affidavits, but the invalidity of the warrant does not

affect the validity of the information. Some decisions of the Federal courts disclose confusion on this subject, and seem to consider the issuance of a valid warrant of arrest a condition to the court's acquiring jurisdiction to try the defendants on the information, and treat the information as invalid because not sufficient as a basis for a warrant of arrest. *United States* v. *Tureaud,* 20 Fed. 621; *United States* v. *Wells,* 225 Fed. 320. There is a dictum in the opinion in *United States* v. *Morgan,* 222 U. S. 274, that one "cannot be tried on an Information unless it is supported by the oath of some one having knowledge of the facts showing the existence of probable cause." Later decisions have clarified this subject and pointed out the distinction between the validity of the information as such and its sufficiency to support a warrant of arrest, and have pointed out that the defendants may be tried on an unverified information, and that the matter of its sufficiency to support a warrant of arrest is immaterial, except when an attack is made on the warrant itself or the detention of the accused under it.

The propositions above stated are supported by the following cases:

> *Weeks* v. *United States,* 216 Fed. 292 (C. C. A., 2d Circuit), certiorari denied, 235 U. S. 697.
>
> *Kelly* v. *United States,* 250 Fed. 947 (C. C. A., 9th Circuit); certiorari denied *Galen* v. *United States,* 248 U. S. 585.

United States v. *Newton Tea & Spice Co.,* 275 Fed. 394. In this case the accused appeared voluntarily without a warrant.

United States v. *McDonald,* 293 Fed. 433. In this case the defendant was already in custody, having been arrested before the unverified information was filed.

Morgan v. *United States,* 294 Fed. 82 (C. C. A., 4th Circuit). In this case the record did not show an arrest upon a warrant based on information.

Jordan v. *United States,* 299 Fed. 298 (C. C. A., 9th Circuit).

Vollmer v. *United States,* 2 F. (2d) 551 (C. C. A., 5th Circuit). In this case the record did not show that the unverified information was used as a basis for a warrant of arrest.

Ryan v. *United States,* 5 F. (2d) 667 (C. C. A., Fourth Circuit).

Merrill v. *United States,* 6 F. (2d) 120 (C. C. A., 9th Circuit).

Miller v. *United States,* 6 F. (2d) 463 (C. C. A., 3rd Circuit). In this case the accused was tried on an unverified information after a voluntary appearance.

Christian v. *United States,* 8 F. (2d) 732 (C. C. A., 5th Circuit). In this case, where a demurrer was interposed to an unverified information, the court said that "logically, the only advantage a defendant could take of an unverified information would be to secure his release from custody, because there was no proper warrant of arrest," where the information is the basis for the warrant.

It is likewise settled in the State courts that no warrant of arrest is needed as a basis for jurisdiction for trial on an information.

Holcomb v. *Cornish*, 8 Conn. 375.
Commonwealth v. *McGahey*, 11 Gray, 194.

We have been unable to find any statute giving authority to notaries public to administer oaths in criminal proceedings in the Federal courts, and for the purposes of this case we concede that the warrant of arrest was void, because probable cause was not supported by oath or affirmation.

Although the defendants were brought into court under a void warrant, they were not thereafter illegally detained. Upon their arrest, on March 26, 1924, they gave bail and were released from custody, and they were held thereafter under their recognizances. It is settled that a warrant of arrest becomes *functus officio* where the accused enters into a recognizance, and that entering into a recognizance for his appearance is a waiver of all defects in the warrant, as the accused is thereafter held under the recognizance.

State v. *Queen*, 66 N. C. 615.
Ard v. *State*, 114 Ind. 542.
State v. *Downs*, 8 Ind. 42.

The principle is further illustrated by the rule that a waiver of preliminary examination is a waiver of all defects in the warrant of arrest. *People* v. *Harris*, 103 Mich. 473.

The propositions above stated lead to the conclusion that when the plaintiffs in error appeared

for trial, and even before any corrections were made in the affidavits, there was a valid information on file forming a proper basis for the jurisdiction of the court and the accused were in court, not detained by any illegal process but held by virtue of their bonds, the giving of which had waived any defects in the warrant of arrest, and the warrant itself having been executed, they were not held by virtue of it. Before the trial commenced, by the reswearing of the affidavits and by the filing of the supplemental affidavits, there was on file a proper showing of probable cause supported by oath or affirmation, which then justified the detention of the defendants if there had been any necessity for ordering them into custody, but the issuance of a new warrant of arrest would have been futile because the accused were already in court, bound to appear under their bonds.

The only irregularity in the proceedings was over and done with before the trial commenced. It is settled that a court is not deprived of jurisdiction to try the accused merely because the accused was illegally brought into the jurisdiction of the court where, after he arrives in the jurisdiction, he is held by lawful process.

Ker v. *Illinois,* 119 U. S. 436.
Cook v. *Hart,* 146 U. S. 183.
Pettibone v. *Nichols,* 203 U. S. 193.
Lamar v. *United States,* 274 Fed. 160; affirmed *per curiam* in 260 U. S. 711.
United States v. *Unverzagt,* 299 Fed. 1015.

In this case, the fact that the defendants were brought into the presence of the court in the first instance by an arrest under an invalid warrant did not affect the jurisdiction of the court to try them on a valid information, where they were not, at the trial, held in custody under any illegal process and had waived all defects in the validity of the warrant of arrest by giving bond to appear.

The invalidity of the warrant and illegality of the arrest did not render the defendant immune from prosecution under the information.

If the accused had not waived defects in the warrant of arrest by giving bond, there are other grounds on which their attack on the validity of the warrant and of their arrest was properly resisted. Assuming that attack on the validity of their arrest and detention could be made by motion to quash the warrant and for discharge from custody rather than by habeas corpus, their attack on the warrant was defective because coupled with a motion to quash a valid information. Their first motion was directed at the information alone. The substitute motion was a motion to quash the information and the warrant. The motion to quash the information was not well grounded and was properly denied. It is settled that if a motion is too broad and asks for some relief to which the moving party is entitled, it is not error to deny the whole. *Smith* v. *Brown,* 8 Kans. 608, 619; *Beebe* v. *Latimer,* 59 Nebr. 305; *Minnick* v. *Hough,* 41 Nebr. 516; *Smith* v. *Zaner,* 4 Ala. 99, 105; *National State*

Bank v. *Delahaye & Purdy,* 82 Iowa 34; *Chicago Great Western Ry. Co.* v. *McDonough,* 161 Fed. 671; *Elliott* v. *Peirsol,* 1 Pet. 328, 338. Some of these cases deal with motions to strike out evidence, some of which was competent and some of which was not. Some deal with motions to vacate orders granting new trials to two parties, one of whom was entitled to a new trial and the other of whom was not. Others deal with joint motions for new trial, where one party was entitled to it and the other was not. In the case of *Elliott* v. *Peirsol,* which dealt with a motion to strike out evidence, some of which was competent and some of which was not, it was said:

> The court was not bound to do more, than respond to the motion, in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection.

As every step that was taken in the present case to assail the warrant of arrest or the detention was coupled with a groundless attack on the information as such, the overruling of the motions and demurrer were proper.

Again, if the defendants had not given bond and had been held in custody by virtue of an invalid warrant, it would have been error to discharge them from custody because of defects in the original arrest after probable cause for detention was shown by properly verified affidavits.

Nishimura Ekiu v. *United States,* 142 U. S. 651, 662.

Mahler v. *Eby,* 264 U. S. 32, 42.

The sufficiency of the allegations of the information to state an offense is discussed below and has no relation to the question of jurisdiction.

The considerations above set forth dispose of all of the assignments of error involving the constitutional questions or the jurisdiction of the court to try the accused.

II

THE INFORMATION ADEQUATELY CHARGES OFFENSES AGAINST THE UNITED STATES

In support of their assertion that the information in this case fails to charge any offense against the United States, plaintiffs in error say that the traffic in intoxicating liquors proscribed by the National Prohibiton Act is only such as *is intended for use for beverage purposes;* that in no count of the information is it alleged that the intoxicating liquor charged to have been trafficked in by plaintiffs in error *was intended for use for beverage purposes,* and that the ninth count fails even to characterize the liquor *as fit for beverage purposes.* This argument of plaintiffs in error is premised upon too narrow a view of the scope and effect of the National Prohibition Act. It is true that the prohibition of the Eighteenth Amendment is against "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the

exportation thereof from the United States * * * for beverage purposes," but in the enforcement of that constitutional provision Congress has seen fit, in the National Prohibition Act, to regulate the traffic in intoxicating liquors even though intended for nonbeverage use. For example, Section 3 of Title II provides that "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold * * * and possessed, *but only as herein provided,*" and Section 4 of the same title requires a permit for the purchase of intoxicating liquor intended for use in the manufacture of the nonbeverage articles enumerated in that section. The fallacy of plaintiffs in error's argument is further illustrated by the definition of "intoxicating liquor" contained in Section 1 of Title II. That section provides that—

> When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *.

It is no part of the foregoing definition that the articles therein named or described shall be "in-

tended for use for beverage purposes"; it is sufficient that they shall be "fit for beverage purposes."

The information was in nine counts. A comparison of them with the sections of law upon which they were based shows clearly that each count followed the statute and sufficiently charged an offense against the United States.

The first four counts charged unlawful sales of liquor. The first charged that the defendants—

> * * * on to wit, the 19th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully sell a large quantity of intoxicating liquor, to wit;—two drinks of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (R. 1–2.)

Except that different dates and quantities of whisky were alleged therein, the second, third, and fourth counts charged the defendants with illegal sales of intoxicating liquor in the same language as that used in the first count.

The fifth to the eighth counts, inclusive, charged possession of liquor contrary to law. In the fifth count the charge was that the defendants—

> * * * on to wit, the 19th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully have in their possession a large quantity of intoxicating liquor, to wit one-half pint of whisky, which said whisky then and there contained more than one-half of one per cent of alcohol by volume, and which said whisky was then and there fit for use for beverage purposes, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States. (R. 3.)

The sixth, seventh, and eighth counts followed the language of the fifth, except for the date upon which the whisky was alleged to have been possessed.

It is apparent that the first eight counts of the information were based upon the provision of Section 3, Title II, of the National Prohibition Act, that—

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, * * * sell * * * or possess any intoxicating liquor except as authorized in this Act, * * *.

The necessity for charging that the sales and possession alleged were not authorized by the Act was expressly obviated by the provisions of Section 32 of Title II, that—

> * * * It shall not be necessary in any affidavit, information, or indictment * * * to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so.

In view of the definition of "intoxicating liquor" in Section 1, and of the above-quoted provisions of Section 32, there can be no doubt that each of the first eight counts of the information charged an offense under Section 3.

The last count charged nuisance and was that the defendants—

> * * * on to wit, the 27th day of February in the year of our Lord one thousand nine hundred twenty-four, at East St. Louis, in the County of St. Clair, in the State of Illinois, in the Eastern District aforesaid, and within the jurisdiction of said court, did then and there unlawfully maintain a common nuisance in violation of the provisions of the National Prohibition Act, by then and there unlawfully selling, keeping and bartering intoxicating liquor in a certain building located at 328 East Broadway, in the

> City of East St. Louis aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. (R. 5.)

That count was based upon the following provisions of Section 21 of Title II:

> Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor * * *.

Plaintiffs in error complain that the ninth count failed to allege that the intoxicating liquor therein referred to was fit for beverage purposes. But the language of that count, charging that the defendants "did then and there unlawfully maintain a common nuisance in violation of the provisions of the National Prohibition Act, by then and there unlawfully selling, keeping and bartering intoxicating liquor" on a date and upon premises specifically named, followed almost verbatim the language of Section 21, *supra,* and as, by reference to Section 1, the words "intoxicating liquor," as used in Section 21, necessarily meant a substance "fit for beverage purposes," the defendants were sufficiently apprised that the "intoxicating liquor" which they were charged with having sold, kept, and bartered was fit for beverage purposes.

Moreover, as each count of the information closely followed the language of the statute upon which it was based, it was incumbent upon the defendants, if they regarded any such count as lacking in sufficient particularity to apprise them of the charge they were therein called upon to meet, to request a bill of particulars, which they failed to do. In a similar instance this Court declared (*Ledbetter* v. *United States,* 170 U. S. 606, 612):

> Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offence the offence may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offence. Where the statute completely covers the offence, the indictment need not be made more complete by specifying particulars elsewhere obtained. *Whiting* v. *State,* 14 Connecticut, 487; *Simmons* v. *State,* 12 Missouri, 268; *State* v. *Smant,* 4 Rich. (S. C.), 356; *Parkinson* v. *State,* 14 Maryland, 184.

III

THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE TRIAL COURT IN SUBMITTING THE CASE AGAINST THE TWO ALBRECHTS TO THE JURY

Defendants in the court below interposed a motion, at the conclusion of the Government's evidence, to direct a verdict of not guilty (R. 41–42)

as to Henry Albrecht, Sr., and Henry Albrecht, Jr., which raises the question whether there was any evidence to support the verdict. The evidence disclosed circumstances indicating proprietorship of the premises in question on the part of the two Albrechts, supervision by them over the finances of the place, and observation of and control over the bartender, Maher.

Henry Albrecht, Sr., was in the cashier's cage part of the time and Albrecht, Jr., was there on other occasions and cashed checks, handled the money, and gave out trade checks to be used in the place. (R. 27, 29, 32.) Henry Albrecht, Sr., did not pay for drinks served to him and his friends. Both were seen behind the bar. (R. 33, 34, 35.) Albrecht, Jr., followed the bartender, Maher, into the rear room when Maher went there to get the liquor sold the agents. (R. 33, 34, 35.) He or both the Albrechts were in the place at every visit made by the agents. (R. 27, 29, 32, 33, 37.)

The District Court in charging the jury said (R. 43):

> The question here is, of course, as to the guilt of each and all of these defendants. There is no direct evidence of a direct sale by either Henry Albrecht, Senior, or Henry Albrecht, Junior, as I recall the evidence; if I am in error you will remember the facts. The law upon that subject is this, gentleman; If under the facts and circumstances in evidence you believe that they were concerned in, that they were participating in, the sales

or in the possession of liquor at this particular place; if they had a business interest in it; if they had a common concern in it; if they were cooperating with defendant Maher; if the defendant Maher was their employee and sold such liquor and if they knowingly saw him sell such liquor in their place, or if it was their place and if they knowingly authorized him to sell and he did sell, or if they, acting in conjunction with him, participated in the sale of liquor or in the possession of liquor, then the guilt, if there is guilt, would be as much theirs as his, and the mere fact that one of several who are concerned in a joint enterprise makes a sale does not relieve the others if they are jointly interested with him. That is a question, of course, for you to determine from the evidence.

IV

DOUBLE PUNISHMENT WAS NOT IMPOSED

The final insistence of plaintiffs in error is that as the liquor which they were convicted of having sold was the same liquor which they were convicted of having possessed, and as they could not have sold such liquor without having possessed it, therefore their conviction of having sold necessarily included the offense of having possessed, and in imposing upon them separate penalties for the sale and possession of the District Court had subjected them to a double punishment for the same offense prohibited by the Fifth Amendment.

But possession and sale of intoxicating liquor under Section 3, Title II, of the National Prohibition Act do not constitute a single offense, but on the contrary two separate and distinct offenses, either of which may be committed without the commission of the other, and one of which may follow the other. Obviously, a person may possess intoxicating liquor without selling it; and he may possess it first and sell it later, as was done here. The fact that in a given case a person sold the same liquor which he possessed is not sufficient to render both the possession and sale a single offense.

While the particular point has not been before this Court for determination, similar contentions have been urged before it with reference to convictions under other statutes. Thus, in the case of *Burton* v. *United States,* 202 U. S. 344, where the statute involved declared that "No Senator * * * shall receive or agree to receive any compensation whatever" for services rendered or to be rendered by him in his official capacity, the plaintiff in error contended that under the evidence his conviction of *having received* necessarily included a conviction for *having agreed to receive,* and therefore that but one punishment could be imposed. This Court declared, however (p. 377):

> It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation separate, distinct offenses. The statute, in apt words, expresses that thought by say-

> ing: "No Senator * * * shall receive *or* agree to receive any compensation whatever, directly or indirectly, for any services rendered or to be rendered," etc. There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. * * * But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense.

In *Gavieres* v. *United States,* 220 U. S. 338, the defendant was convicted and sentenced under an ordinance of the city of Manila which made it an offense for anyone to be drunk, or to behave in a drunken, boisterous, rude, or indecent manner in any public place. He was thereafter convicted and sentenced for violation of an article of the Philippine Code imposing a penalty upon anyone who should outrage or insult a public official. Both convictions were based upon the same acts. Asserting that the two offenses were actually but one and that by his conviction under the Code he had been placed

in double jeopardy contrary to the Organic Act of the Territory, Gavieres took the case to the Supreme Court of the Philippine Islands, which sustained the conviction. Upon a further review, this Court, affirming the latter judgment, said:

> It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different.

And in *Morgan* v. *Devine,* 237 U. S. 632, where the defendant was convicted under one count of an indictment for violation of Section 192 of the Criminal Code (breaking into a post office with intent to commit a larceny therein), and under another count for violation of Section 190 of the same Code (knowingly stealing property of the Post Office Department), and was given a separate sentence of imprisonment upon each conviction, this Court sustained the judgment over the objection of the defendant that, as under the circumstances of that case the act charged in the first count was necessarily incident to the act charged in the second, he had committed but one offense and therefore could not be subjected to more than one penalty without violation of the Fifth Amendment.

CONCLUSION

The judgment of the District Court should therefore be affirmed.

Respectfully submitted.

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